UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v. **Case No. 8:03-CR-77-T-30TBM**

HATEM NAJI FARIZ
_____/

MOTION IN LIMINE OF HATEM NAJI FARIZ TO PRECLUDE TESTIMONY BY MATTHEW A. LEVITT UNDER FEDERAL RULES OF EVIDENCE 401, 402, 403, 702, 703, AND 704(b) AND MEMORANDUM OF LAW IN SUPPORT

Defendant, Hatem Naji Fariz, by and through undersigned counsel, and pursuant to Federal Rules of Evidence 401, 402, 403, 703, 704(b) and the Fifth Amendment to the U.S. Constitution respectfully requests that this Court preclude the government's terrorism expert, Matthew A. Levitt, from testifying on certain issues. As grounds in support, Mr. Fariz states:

On April 18, 2005, Mr. Fariz received a summary of the proposed testimony of the government's purported expert on terrorism, Matthew A. Levitt. (Attached as Exhibit A.) The summary contains many instances of what would constitute irrelevant and inflammatory testimony if admitted, and also reflects research methods and sources that are inherently unreliable. This Court should therefore preclude Mr. Levitt from testifying on significant amounts of the areas he identifies in the summary of his proposed testimony.

I. Testimony to be Excluded Under Federal Rules of Evidence 401, 402, and 403

A. Legal Standard

To be admissible at trial, evidence must be relevant. The Federal Rules of Evidence define "relevant evidence" as:

> [E]vidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Fed. R. Evid. 401. Relevance depends on the "relation between an item of evidence and a matter properly provable in the case." Fed. R. Evid. 401 advisory committee notes. As a logical corollary, Rule 402 requires the exclusion of irrelevant evidence. Fed. R. Evid. 402.

This Court may exercise its discretion to exclude even relevant evidence if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403. As the Advisory Committee Notes to Rule 403 explain, "'[u]nfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, through not necessarily, an emotional one." Fed. R. Evid. 403 advisory committee's notes. The "availability of other means of proof may . . . be an appropriate factor" to consider when deciding whether to exclude on the grounds of unfair prejudice. *Id.* The Eleventh Circuit has recognized that "sometimes expert opinions that otherwise meet the admissibility requirements may still be excluded by applying Rule 403." *United States v. Frazier*, 387 F.3d 1244, 1263 (11th Cir. 2004). In this regard, because "expert testimony may be assigned talismanic significance in the eyes of lay jurors. . .the district courts must take care to weigh the value of such evidence against its potential to mislead or confuse." *Id.*

B. Specific Requests

1. Events and Statements After February 19, 2003

As an initial matter, this Court should exclude as irrelevant all testimony regarding events, statements, or incidents that occurred after February 19, 2003, the date of the initial indictment in this case. Mr. Fariz's role, if any, in the alleged PIJ conspiracy clearly ended after the issuance of the indictment and his subsequent arrest, and any testimony regarding actions or statements occurring after that date would violate his constitutional right to due process, since he has not been properly noticed regarding any activity or speech post-February 2003. Any such testimony would also be irrelevant to the Counts in the Superseding Indictment. The only purpose such testimony would serve is to prejudicially inflame the jury against Mr. Fariz. Additionally, Mr. Fariz would request that all witnesses, not just Mr. Levitt, be precluded from offering testimony regarding activity or speech post-February 2003.

Specifically, all the conspiracy counts in the original Indictment were alleged as "continuing until in or about the date of this Indictment," or "continuing until the date of this Indictment," or "continuing to the date of this Indictment." (Doc. 1 at 8, 85, 87, 98.) The Superseding Indictment in this case, which was returned on September 21, 2004, contains the exact same language regarding the date of the alleged conspiracies in Counts One-Four as the original Indictment, except that it substitutes the term "Superseding Indictment" for "Indictment." (Doc. 636 at 8, 101, 104, 116.) The Superseding Indictment, however, makes no allegations that post-date the issuance of the original Indictment. The last Overt Act alleged in Count One dates from January 25, 2003. (*Id*. at 99.) The period in which Mr. Fariz is alleged to have been particularly active in Count Three is "no later than December

2001 and continuing into January 2003." (*Id*. at 112.) Constructively, the government is restricted from presenting evidence of any activity or speech after February 19, 2003.

In a conspiracy case, any testimony about activities after the date the conspiracy ended that goes to prove knowledge and intent as to the alleged conspiracy is inadmissible. *See, e.g., United States v. Gomez,* 927 F.2d 1530, 1535 (11th Cir. 1991) ("Most statements of coconspirators made after an arrest cannot amount to statements in further of a conspiracy" and as such are inadmissible); *United States v. Tombello*, 666 F.2d 485, 490 (11th Cir. 1982); *United States v. Echeverri*, 854 F.2d 638, 645 (3rd Cir. 1988); *United States v. Boyd*, 595 F2d 120, 126 (3rd Cir. 1978) ("The logic of showing prior intent or knowledge by proof of subsequent activity escapes us"). Mr. Fariz is not on notice of any activity or speech after February 19, 2003, and that any testimony on such matters would be both unconstitutionally prejudicial and irrelevant.

Mr. Levitt's summary includes many instances of this prejudicial and irrelevant potential testimony, such as: 1) the July 2003 decision of Palestinian Authority Prime Minister Mahmoud Abbas to outlaw "illegal organizations" like the PIJ (Exhibit A at 6); 2) the statement of alleged PIJ leader Muhammad al-Hindi of February 2005 on the current ceasefire (*id.* at 9); 3) an alleged attack by a PIJ operative in Tel Aviv on February 25, 2005 (*id.* at 9, 13); 4) an alleged PIJ attack in August 2003 (*id.* at 13); 5) an alleged PIJ attack on October 4, 2003 (*id.* at 13); 6) quoting an alleged Hamas leader in an October 2003 interview (*id.* at 17); 7) referring to a "preliminary deal" in "late 2003" between the leaders of PIJ and

Hamas to merge their military wings (*id.*); 8) quoting a Hizballah leader's statements of December 2003; and several other similar references.

Since any and all counts and conspiracies alleged in this case effectively ended on February 19, 2003, events occurring or statements made after this date are irrelevant. Even if the Court were to find such testimony relevant, its admission would certainly violate Rule 403 since it would constitute, *inter alia*, unfair prejudice, misleading the jury, and wasting the jury's time by confusing the issues. Further, Mr. Fariz would request that the Court preclude all witnesses, not only Mr. Levitt, from testifying to any activity that occurred post-February 2003.

2. Other Designated Terrorists

The summary also makes numerous references to the designated FTO Hibzallah, and two of its alleged leaders, Hassan Nasrallah and Imad Mughniyeh, both of whom are Specially Designated Terrorists (SDT) by the Department of the Treasury. (Exhibit A at 11, 14, 19.) At the outset, any references to Hizballah are irrelevant, since there are no allegations that Mr. Fariz was ever a member of Hizballah or had any contact with its members. There are only three mentions of Hizballah in the Superseding Indictment, one of which is a generic allegation, another a reference to the group in a magazine interview with Fathi Shiqaqi, and another that notes the alleged presence of Hizballah representatives at a speech given by Ramadan Shallah in 1996. (Doc. 636 at ¶36, ¶43(178, 237).) Such sparse allegations are not sufficient to render testimony about Hizballah by Mr. Levitt relevant under the Federal Rules of Evidence. Further, the Superseding Indictment makes no

reference to Mr. Nasrallah or Mr. Mughniyeh at all. Any testimony regarding these individuals is irrelevant to this case.

Even assuming for the sake of argument that testimony regarding Hizballah or its leaders is relevant, its prejudicial nature substantially outweighs any probative value. As an FTO and SDT that has been accused of targeting Americans, any mention of it or its leader, Mr. Nasrallah, will only serve to inflame the jury, and impede the attempts of its members to reach a fair and impartial verdict. Any testimony regarding Imad Mughniyeh, who is currently on the FBI's list of most wanted terrorists, even if found relevant by the Court, is far more prejudicial than probative. As mentioned above, there are no allegations in the Superseding Indictment concerning Mr. Mughniyeh, who is accused of being involved in the 1983 bombing of Marine barracks and the 1985 hijacking of a TWA airliner, among other acts, so any testimony regarding him would be far more prejudicial than probative.[1]

References to the designated FTO Hamas and its leaders are irrelevant, since there are no allegations that Mr. Fariz was ever a member of Hamas or had any contact with its leaders or members. To the extent that the Superseding Indictment makes mention of Hamas, the probative value of any such testimony is substantially outweighed by the danger of unfair prejudice to Mr. Fariz through the mention of another FTO, a tack that runs a

[1]Mr. Levitt's assertion that after September 2000, "Iran assigned Imad Mughniyeh, Hezbollah's international operations commander, to help Palestinian militant groups, specifically Hamas and Islamic Jihad," is not borne out by the article he cites. In fact, the article quotes an unnamed former Clinton administration official as saying, "Mugniyah[sic] got orders from Tehran to work with Hamas." The PIJ is expressly not mentioned with respect to this individual. (Exhibit A at fn. 49.)

significant risk of misleading the jury as to the nature of the alleged conspiracies at issue here. Mr. Levitt's summary includes the mention of several Hamas leaders, none of whom are mentioned in the Superseding Indictment, and any inclusion of these individuals in his contemplated testimony is irrelevant. To the extent that the Court may find these individuals relevant, the substantial prejudice that will result from allowing Mr. Levitt to testify about them will certainly outweigh any probative value.

3. Editorialized Comments

Any testimony that editorializes about tangential matters is irrelevant and should be excluded. For example, Mr. Levitt notes that according to Dennis Ross, the former U.S. special envoy for Middle East peace, "Arafat missed a historic opportunity when he turned down the Clinton Proposal presented at Camp David" in late 2000. (*Id.* at 8.) Mr. Ross's opinion on why the Camp David failed is not a part of the allegations in this case and is accordingly irrelevant. Also, testimony regarding unindicted co-conspirator Fawaz Damrah's involvement with the Abdullah Azam and the Afghan Services Bureau, "a non-profit organization. . . founded by Osama Bin Laden and the radical Palestinian sheikh Abdullah Azam that later served as a critical part of the global jihadist network known as al Qaeda" should be excluded. (*Id.* at 20.) Since the Court has already ruled that testimony by government witnesses about Al Qaeda and Osama Bin Laden should be excluded, it bears note that Abdullah Azam and the Afghan Services Bureau, in any of its aliases, do not appear anywhere in the Superseding Indictment, and there are no allegations with respect to Mr. Fariz and this individual or group. (Doc. 1106.) Further, any testimony regarding this

individual or group would be extremely prejudicial to Mr. Fariz, even if found relevant, and would far outweigh any potential probative value.

The mention of Sheikh Yousef Qardawi is irrelevant since there is no mention of him in the Superseding Indictment, the quotes Mr. Levitt attributes to him make no mention of any ties to the PIJ or any of the defendants, and one of the sources employed dates from September 2004, more than a year and a half after the Indictment in this case was issued. (*Id.* at 21, n. 92.) Even assuming that there is some relevance to testimony regarding Sheikh Qardawi, any probative value would be greatly undermined by the fact that he is quoted as highlighting the "'obligation incumbent on the Muslims to kill American citizens in Iraq.'" (*Id*.)

Likewise, testimony regarding Shiekh Omar Bakri Mohammed, the leader of the "radical Muhajoroon group in Great Britain," is totally irrelevant to any of the allegations in this case. (*Id*.) There is no mention of this individual or group in the Superseding Indictment and the reference comes from an article dated January 19, 2005, nearly two years after the Indictment in this case was issued. This group and its leader are allegedly tied to Al Qaeda, so any reference, even if found relevant, is far more prejudicial than probative.

Testimony regarding any of the topics covered by a Freedom House report from January 2005 entitled "Saudi Publications On Hate Ideology Fill American Mosques" is irrelevant, since there is no mention of Saudi Arabia or its government anywhere in the Superseding Indictment and the date of the report occurs well after the alleged conspiracies in this case ended. (*Id*. at 22.) Mr. Fariz is not alleged to have any ties to the government

of or groups in Saudi Arabia. None of the topics covered in this report are in any way relevant to the allegations here, and would be far more prejudicial than probative. The same is true for testimony regarding Saddam Hussein,[2] the Halhoul Charity Committee, and the Holy Land Foundation for Relief and Development, the latter two being alleged Hamas front groups. (*Id*.) There is no mention of any of these groups or individuals anywhere in the Superseding Indictment. Any testimony on these groups or individuals would be far more prejudicial than probative, especially given the lack of any ties to the allegations here.

II. Testimony to be Excluded Under Federal Rules of Evidence 703 & 704(b)

A. Rule 703

Federal Rule of Evidence 703 permits an expert witness to forge his opinion based on facts or data that are "reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." Fed. R. Evid. 703. In making this evaluation, the Court must first determine "whether the facts are of a type reasonably relied upon by experts in the particular field." *Frazier,* 387 F.3d at 1260; *Bauman v. Centex Corp.*, 611 F.2d 1115, 1120 (5th Cir. 1980).[3] The Court must then determine whether the probative value of the underlying data in question substantially outweighs its prejudicial effect. Fed. R. Evid. 703. This section of Rule 703 "provides a presumption against disclosure to the jury of

[2]The Court has already ruled that testimony by government witnesses about Saddam Hussein should be excluded. (Doc. 1106.)

[3]In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions handed down by the former Fifth Circuit before October 1, 1981.

information used as the basis of an expert's opinion and not admissible for any substantive purpose, when that information is offered by the proponent of the expert." Fed. R. Evid. 703, advisory committee note; *Schafer v. Time, Inc.*, 142 F.3d 1361, 1374 (11th Cir. 1998); *Turner v. Burlington Northern Santa Fe Railroad Co.*, 338 F.3d 1058, 1062 (9th Cir. 2003).

In his summary, Mr. Levitt describes in detail the actions and movements of alleged PIJ operatives, based on no less than seven Israeli military press releases that purport to be derived from secret Palestinian Authority intelligence files. (Exhibit A at 15-17 and corresponding footnotes 53-58, 60-65, and 69-71.) In the first instance, those documents constitute inadmissible hearsay within hearsay, since they cite to remarks and commentary made by Palestinian Authority officers, who are not alleged co-conspirators or the subject of any allegations in this case, regarding alleged PIJ operatives and activities. Secondly, there is no way to reliably establish the veracity of the information described, given the biased nature of the release of the contents of these documents and their source. Given these factors, it is implausible that experts in the field would be able to rely on such documentary evidence in crafting reliable expert testimony.

The summary also states that the PIJ operates "a small number of dawa (social welfare and religious indoctrination) organizations," and that one of those groups is "the al Ihsan Society (also know and the Birr Elehssan Society) in Gaza." (*Id*. at 12.) A review of the sources Mr. Levitt cites to support this assertion reveals that one is from the Israeli Ministry of Foreign Affairs, one is an Israeli military press release, and one is from an entity called the Intelligence and Terrorism and Information Center at the Center for Special

Studies, which upon information and belief, is located in Israel.[4] (*Id*. at fn. 33.) The documents themselves are made up of inadmissible hearsay, and all hew to the same line, rendering them completely unreliable as a basis for expert testimony. It is therefore implausible that experts in the field would be able to rely on such documentary evidence in crafting reliable expert testimony.

Even if the Court does not exclude these opinions in their entirety, it should bar Mr. Levitt from testifying about the inadmissible hearsay upon which he relies. The government has not and cannot establish that the "probative value [of these documents] in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect." Fed. R. Evid. 703. Because the government cannot overcome the Rule 703 presumption against admission of hearsay upon which an expert may rely, this Court should preclude Mr. Levitt from testifying about the materials upon which he relies to support the above referenced conclusions.

B. Rule 704(b)

Federal Rule of Evidence 704(b) forbids an expert in a criminal case from offering "an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged." Fed. R. Evid. 704(b). Mr. Levitt's expert summary raises serious concerns that his testimony will violate this Rule, particularly

[4]The homepage for this organization's website, www.intelligence.org.il, features the statement "C.S.S. Center for Special Studies In Memory of the Fallen of the Israeli Intelligence Community."

in light of this Court's ruling that part of what the government must show to find the defendants guilty of violations of 18 U.S.C. § 2339B is that they "knew (had a specific intent) that the support would further the illegal activities of the FTO." *United States v. Al-Arian*, 308 F. Supp.2d 1322, 1339 (M.D. Fl. 2004). The expert summary contains an entire section entitled "Economic Jihad," in which Mr. Levitt discusses the alleged ways in which "Sami al Arian and the other members of the Islamic Jihad network in Tampa and Chicago personally and proactively raised funds for Islamic Jihad." (Exhibit A at 19.) The upshot of this proposed testimony seems to be that raising money for the PIJ is one of the main methods the defendants allegedly employed in their alleged roles as members of the alleged PIJ enterprise. Testimony of this sort falls dangerously close to stating outright that Mr. Fariz had the requisite specific intent to further the illegal activities of the PIJ, a subject as to which Mr. Levitt cannot opine. Expert testimony "may not. . .merely tell the jury what result to reach." *Montgomery v. Aetna Cas. & Surety Co.*, 898 F.2d 1537, 1541 (11th Cir. 1990) ("A witness also may not testify to the legal implications of conduct; the court must be the jury's only source of law") . Further, all of the examples the expert summary gives relating to the defendants or alleged co-conspirators in this case predate by many years the first allegation of a violation of the material support law in this case, *i.e.*, February 26, 2002. (*Id*. at 19-22; Doc. 636 at 120.) This Court should therefore preclude any testimony by Mr. Levitt on the subject of whether or not Mr. Fariz had the specific intent to further the unlawful activities of the PIJ.

III. Conclusion

Accordingly, Mr. Fariz respectfully requests that this Court preclude the government's expert, Matthew A. Levitt, from testifying on the issues described above, pursuant to Federal Rules of Evidence 401, 402, 403, 703, 704(b) and the Fifth Amendment to the U.S. Constitution.

Respectfully submitted,

R. FLETCHER PEACOCK
FEDERAL PUBLIC DEFENDER

/s/ Wadie E. Said

Wadie E. Said
Assistant Federal Public Defender
400 North Tampa Street, Suite 2700
Tampa, Florida 33602
Telephone: 813-228-2715
Facsimile: 813-228-2562
Attorney for Defendant Fariz

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of June, 2005, a true and correct copy of the foregoing has been furnished by CM/ECF, to Walter Furr, Assistant United States Attorney; Terry Zitek, Assistant United States Attorney; Cherie L. Krigsman, Trial Attorney, U.S. Department of Justice; Alexis L. Collins, Trial Attorney, U.S. Department of Justice; William Moffitt and Linda Moreno, counsel for Sami Amin Al-Arian; Bruce Howie, counsel for Ghassan Ballut; and to Stephen N. Bernstein, counsel for Sameeh Hammoudeh.

/s/ Wadie E. Said
Wadie E. Said
Assistant Federal Public Defender